UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM E. CALLAHAN,	:	
Plaintiff	:	
	:	
v.	:	Civil Action No.
	:	3:01 CV 1205 (CFD)
UNISOURCE WORLDWIDE, INC., ET AL.,	:	
Defendants.	:	

RULING ON MOTIONS TO DISMISS

The plaintiff, William E. Callahan, brings this action against the defendants, Unisource Worldwide, Inc., Georgia-Pacific Corporation, Alco Standard Corporation, and IKON Office Solutions, Inc., alleging violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq., and state statutory and common law. The plaintiff seeks compensatory, liquidated and punitive damages, and attorney's fees and costs. Pending are motions to dismiss by defendants Unisource Worldwide, Inc. and Georgia-Pacific Corporation [Doc. #16] and defendants IKON Office Solutions, Inc. and Alco Standard Corporation (the "IKON defendants") [Doc. #12].

I. Facts[1]

William E. Callahan ("Callahan"), was born on April 9, 1948 and was employed by defendant Unisource Worldwide, Inc. ("Unisource") from 1980 through 1998 as Vice-President of Customer Service in Unisource's offices in Windsor, Connecticut. Unisource is a subsidiary of defendant IKON

[1]The facts are taken from the plaintiff's complaint, and any documents incorporated by reference, and are accepted as true for purposes of the motion to dismiss. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47- 48 (2d Cir. 1991).

Office Solutions, Inc. ("IKON"), formerly known as Alco Standard Corporation, and was acquired by defendant Georgia-Pacific Corporation ("Georgia-Pacific") in July 1999.

Callahan alleges that he was compelled to retire and sign a severance agreement with Unisource on December 24, 1998.[2] The agreement promised Callahan, inter alia, a $70,000 payment and continued coverage by Unisource's medical and health insurance program. The agreement also represented that Callahan would receive certain benefits under the "1991 ALCO Standard Corporation Deferred Compensation Plan," later known as the "1991 IKON Office Solutions Deferred Compensation Plan" (hereinafter "the IKON Plan"). More specifically, the severance agreement provided that Callahan was fully vested in his account under the IKON Plan, which at that time provided for periodic payments after he reached sixty-five years of age and a lump sum death benefit. The severance agreement also included a waiver and release by Callahan of all employment related claims against Unisource, including any claims pursuant to the ADEA.

On March 25, 1999, Callahan filed a charge of unlawful age discrimination against Unisource with the Connecticut Human Rights Organization ("CHRO") and the Equal Employment Opportunity Commission ("EEOC"). On August 23, 1999, the CHRO dismissed that charge, and on March 21, 2000, denied Callahan's request for reconsideration of that dismissal.[3]

On December 31, 2000, the Board of Directors of IKON terminated the IKON Plan. On January 2, 2001, the IKON Plan sent Callahan a termination benefit of $28,356.91 and ended his

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[2]Callahan was fifty years old at the time.

[3]On March 30, 2001, Callahan received a notice from the EEOC granting him the right to sue under the ADEA.

participation in the plan.

On June 22, 2001, Callahan filed the instant complaint. Count One alleges age discrimination in violation of the ADEA by defendants Unisource and Georgia Pacific in connection with Callahan's termination and the discontinuation of the IKON Plan. The remaining counts raise Connecticut state law claims concerning only the termination of the IKON Plan. Counts Two through Six are directed against Unisource and Georgia Pacific and allege breach of contract (Count Two), breach of the implied duty of good faith and fair dealing (Count Three), violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110 et seq. ("CUTPA") (Count Four), reckless misrepresentation (Count Five), and negligent misrepresentation (Count Six). Finally, Count Seven alleges tortious interference with contractual relationship and financial expectancy against the IKON defendants.

Defendants Unisource and Georgia-Pacific have filed a motion to dismiss [Doc. #16] on the following grounds: (1) Callahan fails to state a claim for breach of contract because the defendants did not breach the severance agreement; (2) each of Callahan's claims are barred under the terms of the agreement because he waived his right to bring any employment-related claim against Unisource; (3) Callahan's state law claims are preempted by ERISA; (4) recission is an inappropriate remedy; (5) Callahan's ADEA claim fails with respect to Georgia-Pacific because (a) he did not file an age discrimination charge with the EEOC against Georgia-Pacific and (b) Georgia-Pacific was not his employer; and (6) Callahan's breach of good faith and fair dealing claim is barred as a matter of public policy. The IKON defendants' motion to dismiss Count Seven argues that Callahan's state law claim against them is preempted by ERISA.

II. Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with his allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale-New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, a court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

III. Discussion

A. ADEA Discrimination Claim (Count One)

Unisource argues that Callahan's age discrimination claim is barred under the terms of the

severance agreement because he waived his right to bring any employment-related claim. Georgia-Pacific maintains that (1) it was not his employer and (2) Calllahan failed to file a charge with the Equal Employment Opportunity Commission ("EEOC") against *it*. Each argument will be addressed below.

1. Waiver of ADEA Claim

The validity of an employee's waiver of an ADEA claim is governed by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f) et seq., which requires that any waiver of rights or claims under ADEA be knowing and voluntary. At a minimum, this requires that waivers comply with the specific duties imposed on employers by OWBPA, 29 U.S.C. § 626(f)(1). See Tung v. Texaco Inc., 150 F.3d 206, 208-209 (2d Cir.1998) (per curiam). Additionally, the district court must review the "totality of the circumstances" and determine that the waiver is knowing and voluntary. See id.; see also Bormann v. AT & T Communications, Inc., 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924(1989); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 463 (2d Cir.1998).

Callahan alleges that Unisource induced him to sign the severance agreement and waiver by misrepresenting the benefits he would receive by retiring. Compl. ¶ 10. As such allegations are sufficient to defeat a conclusion that he knowingly and voluntarily waived his ADEA claim, Unisource's motion to dismiss this claim is denied.[4]

2. "Employer" Under the ADEA

Georgia-Pacific argues that it was not Callahan's employer for purposes of his ADEA claim

[4]This is without prejudice to Unisource filing a motion for summary judgment on this issue, or the issue of whether Callahan's ADEA claim is barred by the doctrines of ratification and tender back. See Defs.' Mem. Supp. Mtn. to Dismiss at 22.

and that Callahan's complaint does not allege any facts from which it could be inferred that it was his employer or had anything to do with his employment.

In the employment context, liability may attach to an affiliated corporation if the plaintiff can demonstrate that there are "sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer." Herman v. Blockbuster Entertainment Group, 18 F. Supp. 2d 304, 308 (S.D.N.Y. 1998) (Lowe, J.) (internal quotation marks omitted), aff'd 182 F.3d 899 (2d Cir. 1999), cert. denied, 528 U.S. 1020 (1999); Gagliardi v. Universal Outdoor Holdings, Inc., 137 F. Supp. 2d 374, 378 (S.D.N.Y. 2001).

The Second Circuit has established a four-part test indicating what a plaintiff must demonstrate in order to establish that corporations are related in such a manner: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995) (quoting Garcia v. Elf Atochem North America, 28 F.3d 446, 450 (5th Cir. 1994)). A court should focus its inquiry on the "'second factor: centralized control of labor relations.'" Id. (quoting Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983). The critical question to be answered is: "'What entity made the final decisions regarding employment matters related to the person claiming discrimination?'" Id. (quoting Trevino, 701 F.2d at 404).

In paragraph 6 of Callahan's complaint, he alleges that Georgia-Pacific merged with Unisource in July 1999 and "did adopt and ratify each and every act of discrimination and unlawful conduct committed by" Unisource and, since July 1999, acted "in concert with" Unisource in the discriminatory

conduct committed by Unisource, Alco Standard Corporation, and IKON Office Solutions. Compl. ¶ 6. In paragraphs 10 and 11, Callahan alleges that Unisource and Georgia-Pacific discriminated against him on the basis of his age. In his memorandum in opposition to the motions to dismiss, Callahan has also presented evidence of a press release characterizing Georgia-Pacific's merger with Unisource as an initiative to unite the two companies and indicating that several Georgia-Pacific managers would guide Unisource's operations as a subsidiary of Georgia-Pacific.

In light of these allegations, the Court declines to dismiss at this time Callahan's ADEA claim against Georgia-Pacific on the basis that Georgia-Pacific was not his employer.[5]

B. ERISA Preemption of State Law Claims (Counts Two through Seven)

The defendants argue that Callahan's state law claims for breach of contract, breach of the covenant of good faith and fair dealing, CUTPA violations, reckless misrepresentation, negligent misrepresentation, and tortious interference with contract concerning the termination of the IKON Plan are preempted by ERISA because they concern the alleged denial of benefits provided under an ERISA plan to a participant or beneficiary. They further argue that allowing Callahan to go forward with those state law claims would provide him with an alternative enforcement mechanism specifically preempted by ERISA.

According to ERISA's preemption clause, ERISA supersedes "any and all State laws insofar

[5]However, this ruling is without prejudice to Georgia-Pacific moving for summary judgment on this issue. Georgia-Pacific also claims that Callahan's ADEA claim against it fails because Callahan did not name Georgia-Pacific in his EEOC complaint or file a separate EEOC complaint against Georgia-Pacific. In light of the issue as to the relationship between Georgia-Pacific and Unisource, however, the Court will not reach this issue at this time. Georgia-Pacific may also raise this issue in a summary judgment motion.

as they relate to any employee benefit plan." 29 U.S.C. § 1144(a). In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), the Supreme Court stated: "the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Id. at 45-46 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). Courts once interpreted this preemption clause by focusing on the question of whether a particular state law related to ERISA. See, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983). However, this approach "proved to be a verbal coat of too many colors," and the Supreme Court more recently indicated that a more focused analysis should apply. Plumbing Industry Board, Plumbing Local Union No. 1. V. E.W. Howell Co., 126 F.3d 61, 66 (2d Cir. 1997) (describing the change in approach). Analysis of the preemption clause should begin with the "starting presumption that Congress does not intent to supplant state law." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). To overcome this presumption, a party must convince the court that there is something in the practical operation of the challenged state law to indicate that it is the type of law that Congress specifically aimed to have ERISA supersede. See De Buono v. NYSA-ILA Med. And Clinical Servs. Fund, 117 S. Ct. 1747, 1751-52 (1997).

> The Supreme Court has identified several ways in which the anti-preemption presumption can be overcome. First, preemption will apply where a state law clearly refers to ERISA plans in the sense that the measure acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation. Second, a state law is preempted even though it does not refer to ERISA or ERISA plans if it has a clear connection with a plan in the sense that it mandates employee benefit structures or their administration or provides alternate enforcement mechanisms.

Plumbing Industry, 126 F.3d at 67 (citations and quotations omitted). In Aetna Life Ins. Co. v. Borges,

869 F.2d 142 (2d Cir. 1989), the Second Circuit held that:

> laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application--often traditional exercises of state power or regulatory authority--whose effect on ERISA plans is incidental.

Id. at 146. Accordingly, "[w]hat triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." Id. at 146-147.

The parties do not appear to dispute that the IKON Plan is an employee welfare benefit plan to which ERISA applies. See 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan"). As mentioned, Callahan's complaint sets forth causes of action for breach of contract, breach of the covenant of good faith and fair dealing, CUTPA violations, reckless misrepresentation, negligent misrepresentation, and tortious interference with contract and financial expectancy. The alleged conduct underlying each of these causes of action concerns the termination of the IKON Plan and Callahan's resulting failure to receive a deferred monthly retirement benefit payment and lump sum death benefit. More specifically, in Count Two, Callahan alleges that at the time of the severance agreement, the IKON Plan provided that he would receive a deferred monthly retirement benefit and lump sum death benefit in the future. That count alleges that terminating the IKON Plan before he received those benefits breached the severance agreement. In Count Three, Callahan alleges that Unisource and Georgia-Pacific breached the implied covenant of good faith and fair dealing through this

same conduct, and in Count Four, Callahan alleges that it was an unfair or deceptive act in violation of CUTPA. In Counts Five and Six, Callahan alleges that he was induced to retire based on Unisource and Georgia-Pacific's misrepresentations regarding the deferred compensation arrangement, and finally, in Count Seven, Callahan alleges that IKON Office Solutions, Inc., and Alco Standard Corporation tortiously interfered with the contractual relationship between Unisource and Callahan embodied in the severance agreement and tortiously interfered with the financial expectancy of Callahan to receive the deferred compensation benefits under that agreement.

These causes of action are precisely the type that Congress sought to preempt through ERISA. In Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir.1992), the plaintiff set forth causes of action for breach of contract and negligent misrepresentation, claiming that his employer, Dunham-Bush, had made an oral promise to pay certain pension-related benefits in order to induce him to relocate to Connecticut. According to Smith's complaint, when he "expressed concerns about the inferiority of the United States affiliate's pension plan, Elliot assured him that Dunham-Bush would provide him with a benefits package comparable to what he would have received upon his retirement in the United Kingdom." Id. at 7. In upholding the district court's finding that the state law claims were preempted, the Second Circuit found that Smith "makes explicit reference to the pension plan in his complaint.... the oral representation underlying this suit deals expressly and exclusively with the appellant's benefits." Id. at 10. Additionally, "the calculation of the promised supplemental benefits" would implicate the ERISA plan. Id. As Smith's claims represented "an attempt to supplement the plan's express provisions and secure an additional benefit," the Second Circuit found they were preempted by ERISA. Id.

District courts have found breach of contract and negligent misrepresentation claims preempted

by ERISA in similar contexts. In Hamburger v. Southern New England Telephone Co., 1998 WL 241214 (D.Conn. May 6, 1998), the plaintiff elected to participate in an "Early Out Offer" based on his employer's representation as to the benefits he would receive. Subsequently, Hamburger was informed that the sum he was to receive was significantly less than what had been earlier represented. Dismissing the plaintiff's state law claim of negligent misrepresentation, the district court held that the claim "necessarily relies on the existence of an ERISA plan . . . . [I]t only arises *because of* the existence of an ERISA Plan." Hamburger, 1998 WL 241214 at *3. As the court explained:

> In order to succeed on this negligent misrepresentation claim, Hamburger would have to show that (1) an ERISA plan existed; (2) Hamburger was entitled to the payment of a certain amount of funds under this plan; and (3) the defendants negligently misrepresented the amount that Hamburger would be entitled to receive. Thus, because the negligent misrepresentation claim is intrinsically related to the underlying employee [benefit] plan, it is preempted by ERISA.

Id. at *3 (internal quotation marks omitted). Accordingly, the court held, Hamburger's negligent misrepresentation claim is "intrinsically related to the underlying employee benefit plan [and] is preempted by ERISA." Id. (internal quotation marks and citation omitted).

Similarly, in Bedger v. Allied Signal Inc., No. 97-6786, 1998 WL 54411, *4 (E.D.Pa. Jan. 23, 1998), the plaintiff claimed her employer breached its severance agreement when it denied her certain pension benefits under that agreement. She argued that this state law claim did not relate to an employee benefits plan because she was not contesting any element of the plan directly, but rather the defendant's alleged breach of the severance agreement. See Bedger, 1998 WL 54411 at *4. The court held that the breach of severance agreement claim related to the benefits plan because "[i]f the benefits plan did not exist, the Plaintiff would have no breach of contract claim. This claim only exists because it incorporates the terms of the ERISA plan." Id. Accordingly, the court held that the breach

of contract claim was preempted by ERISA. Several other courts have found that breach of contract and negligent misrepresentation claims arising out of early retirement agreements in similar circumstances are preempted by ERISA. See, e.g., Zito v. SBC Pension Benefit Plan, No. 3:02CV277(JBA), 2002 WL 31060363, at *3 (D. Conn. July 18, 2002); Carlo v. Reed Rolled Thread Die Co., 49 F.3d 790, 793-95 (1st Cir. 1995); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994).

As in Smith, Hamburger, and Bedger, Callahan sets forth breach of contract and misrepresentation claims in connection with his employer's promises regarding benefits he was to receive in exchange for certain employment consequences. With regard to each of these causes of action, Callahan makes "explicit reference to the pension plan in his complaint," and each of these causes of action concern his receipt of benefits under the plan. Smith, 959 F.2d at 11. As noted above, in Count Two, Callahan's breach of contract claim, Callahan alleges that terminating the IKON Plan before he received the deferred monthly retirement benefit and lump sum death benefit breached the severance agreement. In Counts Five and Six, the misrepresentation claims, Callahan alleges that he was induced to retire based on Unisource and Georgia-Pacific's misrepresentations regarding the deferred compensation arrangement. As in Smith, these representations deal "expressly and exclusively" with the benefits under the ERISA plan. Id. at 10.

Furthermore, the calculation of the defendants' promised benefits will implicate the ERISA plan. See id. at 12. The Court will be required to refer to the IKON Plan in order to determine whether Callahan received the benefits which were promised to him. Finally, as in Bedger, though Callahan argues that his state law claims do not relate to an employee benefit plan because he is not

contesting any element of the plan directly, but rather the defendants' alleged breach of the severance agreement, the foregoing analysis indicates that the state law claims do relate to an ERISA Plan. See Bedger, 1998 WL 54411 at *4. Accordingly, Callahan's breach of contract, reckless misrepresentation, and negligent misrepresentation claims are pre-empted by ERISA. See id.; Hamburger, 1998 WL 241214 at *3; Bedger, 1998 WL 54411 at *4; see also Pilot Life, 481 U.S. at 47 (holding that employee's common law causes of action of breach of contract, and fraud in the inducement were preempted by ERISA).

Callahan's other causes of action–breach of the duty of good faith and fair dealing, CUTPA violations, and tortious interference–are likewise preempted, as they also make explicit reference to the IKON plan, concern his receipt of benefits under the plan, and require reference to the plan to calculate the promised benefits. See Smith, 959 F.2d at 11-12; DeGrooth v. General Dynamics Corp., 837 F. Supp. 485 (D. Conn. 1993) (CUTPA claim preempted); Murphy v. Metropolitan Life Ins. Co., 152 F.Supp.2d 755, 757 (E.D. Pa. 2001) ("[P]laintiff's statutory law bad faith and consumer protection claims 'relate to' an employee benefit plan and are expressly preempted"). Therefore, Counts Two through Seven of Callahan's complaint are preempted by ERISA.[6]

In light of this holding, Callahan may wish to amend his complaint to add an ERISA cause of action. Should he file a motion for leave to do so, the Court will entertain the motion, as well as any objections to it.[7] See, e.g., Bellavita v. Paul Revere Life Ins. Co., No. 3:96CV608 (AHN), 1997 WL

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[6]Accordingly, the Court need not reach Unisource and Georgia-Pacific's alternative arguments.

[7]This ruling does not address whether the severance agreement waiver would bar an ERISA claim by Callahan.

597115, at * 2 (D. Conn. Sept.11, 1997) (allowing plaintiff to amend his complaint to restate pre-empted state law claims as claims under ERISA).

IV. Conclusion

For the preceding reasons, the motion to dismiss by defendants Unisource Worldwide, Inc. and Georgia-Pacific Corporation [Doc. #16] is GRANTED IN PART, DENIED IN PART. The motion to dismiss by defendants IKON Office Solutions, Inc., and Alco Standard Corporation [Doc. #12] is GRANTED. Only Count One, Callahan's ADEA claim against Georgia-Pacific and Unisource, remains in the case.

SO ORDERED this ____ day of March 2003, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE